Supreme Court, U.S.
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No. 99-274

In The

Supreme Court of the United States

PATRICIA JOHNSON, JAIME GOROSTIETA and ESTEBAN EPIFANIO RIVERA,

Petitioners,

v.

E.A. MILLER, INC., RICK BLACK and TED MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is a sexual harassment hostile environment claim barred by the statute of limitations when the last act of alleged harassment occurred more than 300 days prior to the filing of the charge of discrimination?

II. Did Petitioner Johnson fail to present a prima facie case of retaliation when (i) the protected activity preceded the alleged adverse employment action by several months, and (ii) the alleged adverse employment action was merely a reprimand?

III. Did either Petitioner Rivera or Petitioner Gorostieta make out a prima facie case of national origin discrimination when each denied such discrimination, and neither sought to work in jobs allegedly reserved for non-minority employees?

IV. Was Petitioner Gorostieta's request of indefinite leave for carpal tunnel surgery a reasonable accommodation under the Americans with Disabilities Act when Gorostieta had been terminated for poor performance and did not advise E.A. Miller of his need for surgery until his first day of work upon reinstatement?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

E.A. Miller, Inc. is an unincorporated division of Monfort, Inc., a wholly-owned subsidiary of ConAgra, Inc.

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STATEMENT OF THE CASE

This Petition seeks review of the Tenth Circuit decision affirming the dismissal of seven causes of action brought by three plaintiffs under Title VII of the Civil Rights Act of 1964, as amended, and the Americans With Disabilities Act of 1990. Notwithstanding Petitioners' efforts to distort both the factual record and the bases for the Tenth Circuit decision, there is no cause for review in this case. The issues are unremarkable, the evidence does not support Petitioners' statement of the facts, and the Tenth Circuit correctly decided the case.

A. The Petition misrepresents the facts relating to Petitioner Patricia Johnson's claims and the Tenth Circuit's basis for affirmance.

The Petition distorts the facts regarding the claims of Petitioner Patricia Johnson. Johnson was hired in January 1992 as the company nurse for E.A. Miller, a meat processing plant located in Hyrum, Utah. Johnson was a former school nurse with no experience in meat processing operations. As company nurse, Johnson was supervised by Respondent Rick Black, a 20-year veteran of meat processing operations, who was E.A. Miller's safety director and health services manager. Johnson was to provide on-site medical care for E.A. Miller's employees. E.A. Miller has over 1000 employees, most of whom perform repetitive tasks involved in slaughtering cattle and packing beef products for wholesale distribution.

From the start of Johnson's employment, Black and Johnson had strong, conflicting opinions regarding medical care for employees. Johnson was inclined to send an

injured or ill worker to an off-site doctor, while Black preferred, when possible, to treat such employees on site and return them to work. Johnson admitted this dispute over health care was her major source of conflict with Black. Johnson also clashed with Black over the structure of health services. As a subsidiary of ConAgra, E.A. Miller had regular contacts with other ConAgra packing plants. In other ConAgra plants, it was customary to place the nurse in control of health services, whereas at E.A. Miller, the safety director was in charge. Johnson objected to E.A. Miller's health services structure because she wanted to be in control.

Shortly after hire, Johnson learned that Black was involved in a consensual relationship with another employee. She expressed her concerns about the propriety of this relationship to management. Johnson's report to management contributed to her growing conflict with Black. Johnson told Black about her religious beliefs regarding non-marital sexual relationships. Black offered generally contrary opinions and, according to Johnson, suggested that she relax her own scruples and be more willing to have a non-marital sexual relationship. Black never attempted to embrace or kiss Johnson. He never invited her out on a date. The only evidence of a "sexual advance" was Johnson's testimony that Black once obliquely commented that "you should be able to be with who you want to be with," and that "no one ever complained about him before." Johnson stated she complained (only once) to management about Black's alleged comments in May 1992 and that Black made no further offensive comments.

In June 1992, Johnson was invited to attend a training seminar in Colorado for "health services managers" sponsored by another ConAgra company. Johnson's attendance further antagonized Black because he believed, as E.A. Miller's health services manager, he should have gone instead of Johnson. The conflict between Johnson and Black became much more intense after the seminar.

Matters came to a head in July 1992 when Johnson attempted a power play by delivering two letters to E.A. Miller's president, Ted Miller. One letter strongly criticized Black's performance as health services manager; the other letter applied for his job. Neither letter referred to alleged sexual harassment or discrimination. Black received a copy of the letters and responded with a list of Johnson's performance deficiencies. The human resources manager, Eric Falk, suspended Johnson with pay. He then met with Johnson, Black and Miller. In this meeting, Johnson's letters and Black's list of Johnson's performance deficiencies were discussed. After the meeting, Miller resolved the conflict by returning Johnson to work in her previous position without loss of any pay. Miller left Black in charge of health services, but allowed Johnson to report to Falk, with whom she felt comfortable. The Petition incorrectly implies that Johnson's July confrontation with Black occurred because she refused his alleged advances. The confrontation was actually several months after the alleged "advance," and immediately after Johnson tried to supplant Black as health services manager.

In early August 1992, approximately two weeks after the meeting, Johnson accepted a job offer with another

employer and voluntarily quit. On May 24, 1993, she filed a charge of discrimination, claiming sexual harassment, sex discrimination, and retaliation.

The district court granted summary judgment on Johnson's claims and the Tenth Circuit affirmed. The Tenth Circuit ruled that Johnson's sexual harassment claim was barred by the statute of limitations and that her sex discrimination claim failed because there was no evidence of adverse action based on sex. The retaliation claim failed because (i) there was no adverse employment action, and even if there were, (ii) there was no evidence that Johnson's alleged protected activity caused the alleged adverse employment action. The Petition, although unclear, appears to address only the claims of sexual harassment and retaliation.

B. There is no racial segregation at E.A. Miller and Petitioners Rivera and Gorostieta never sought jobs outside their initial work areas.

Petitioners' claim that E.A. Miller has a segregated work force is unsupported and incorrect. Petitioners never presented any statistical evidence and offered only anecdotal observations from ex-employees who generally worked during different time periods or in different departments. As for name-calling, Petitioners presented affidavits from the same time period showing at most that racial or ethnic epithets were used on isolated occasions in varying departments, usually by co-workers, not management. No such epithets were directed at Petitioners Rivera or Gorostieta. Moreover, neither Rivera nor Gorostieta made any attempt to transfer to a position in areas of the plant the Petition alleges are "reserved for

non-minority employees." Rivera and Gorostieta also failed to present evidence showing they were qualified for other positions. Most importantly, both Rivera and Gorostieta disclaimed any discrimination based on their Hispanic national origin. Rivera testified as follows in his deposition:

> Q . . . Let's take those one at a time. In terms of different job assignments, did you feel like you got different job assignments from white people?
>
> A. I didn't feel that. The only thing I feel is just to do my job and that's it.
>
> Q. What about assigned work areas, did you feel that you received different assigned work areas from white people?
>
> A. No, I didn't. They could have the chance the same as I have.
>
> Q. What about workloads, did you feel you had different workloads from white people?
>
> A. No. We all had the same.

Gorostieta also disclaimed national original discrimination:

> Q. Do you believe you were ever discriminated against at E.A. Miller because you're Hispanic?
>
> A. THROUGH THE INTERPRETER: Probably it could be, I guess, like that.
>
> Q. Can you tell me any instance in which you were discriminated against at E.A. Miller on the basis of being Hispanic?
>
> A. THROUGH THE INTERPRETER: No, I have no idea.

Q. One final question on Hispanic discrimination. Do you believe that when you were discharged from E.A. Miller the final time that it was based on your status as an Hispanic person?

A. THROUGH THE INTERPRETER: No.

C. Petitioner Gorostieta was terminated for objective performance deficiencies. An offer of reinstatement was withdrawn because his request for leave to have surgery was for an indefinite period.

Petitioner Gorostieta worked at E.A. Miller as a meat cutter for about nine years. During that time, he received eight written warnings for various rule violations, including poor work performance. Over the last several months of his employment, Gorostieta developed what was later diagnosed as carpal tunnel syndrome in both wrists. He was treated with anti-inflammatory medication and assigned light duty. Because the problem persisted, he then was taken off knife work entirely and moved to a new position operating a saw. His work performance, however, did not improve. After receiving written warnings for poor performance in the new position, he was terminated in August 1993.

After a friend asked E.A. Miller to give Gorostieta one more chance, Gorostieta was offered reinstatement in yet another position. When Gorostieta reported for his first day's work, however, he told his supervisor he could not work and was going on leave because a physician had prescribed carpal tunnel surgery on both wrists. Gorostieta did not tell the supervisor of his prognosis

following surgery or how long he would be out for rehabilitation. In fact, Gorostieta did not know. Based on these facts, E.A. Miller withdrew its offer of reinstatement.

Petitioners' accusation that E.A. Miller had a "policy of eliminating employees regarded as disabled" is false. In fact, Petitioner Johnson testified that injured employees were moved to alternative positions "if there was something else they could do." Johnson further admitted that although some injured employees left E.A. Miller (the asserted basis for Petitioners' claim of a policy to eliminate such employees), she did not know whether these employees voluntarily quit or were discharged. There is simply no evidence for Petitioners' allegation.

D. Petitioner Rivera was terminated because of a serious safety violation.

Petitioner Rivera was employed by E.A. Miller for several years in the slaughter division. He served as a utility man, meaning he was a lead worker, and was qualified to perform all tasks in that area of the plant. About nine months before his discharge, Rivera was involved in an accident at the "side puller" that severely injured his left thumb. Rivera admits that he received proper medical care, including a period of light duty and that when he was returned to regular duty, he felt "good."

Following the accident, safety rules were tightened to avoid further accidents. Employees were warned that a single serious violation would be grounds for termination. In March 1995, nine months after being returned to

regular duty, Rivera was accused of a safety violation at the side puller, the same machine he was operating when injured. A supervisor observed Rivera and a co-worker operating the side puller despite a malfunctioning safety button. Rivera was suspended immediately after the incident and terminated the next working day. Although in his deposition Rivera denied committing the violation, he conceded that his supervisor believed he had committed the violation and that such a violation would be serious. Moreover, Rivera's co-worker admitted that he and Rivera had committed the violation and Rivera admitted the violation in his written application for unemployment benefits.

The Tenth Circuit affirmed summary judgment on Rivera's disability discrimination claim because Rivera admitted his supervisor honestly believed he had committed the safety violation. Accordingly, Rivera was unable to establish a genuine dispute of material fact regarding whether the safety violation was a pretext for unlawful disability discrimination.

REASONS FOR DENYING THE WRIT

I.

JOHNSON'S PETITION SHOULD BE DENIED BECAUSE HER CLAIMS WERE PROPERLY DISMISSED BASED ON SETTLED LAW.

A. The Petition does not address the Tenth Circuit's opinion that Johnson's sexual harassment claim was barred by the statute of limitations.

Although the Tenth Circuit affirmed summary judgment as to five claims of Johnson, she apparently seeks review of only two: sexual harassment and retaliation under Title VII. The Tenth Circuit ruled the sexual harassment claim was time-barred because no act of sexual harassment occurred within 300 days of the date Johnson filed her administrative charge. Pet. App. A at 2a-3a (*citing Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1415 (10th Cir. 1993)).

In an apparent misunderstanding of the circuit opinion, the Petition asserts that the Tenth Circuit erred by substituting a "single instance of discrimination" test in place of this Court's test for establishing hostile environment harassment. Petition at 11 (*citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295, 301-02 (1993)). It does not address the issue of the statute of limitations at all. The Petition does not identify any split in the circuits or even allege that the Tenth Circuit's application of the statute of limitations was incorrect. In the absence of any apparent argument regarding the Tenth Circuit's basis for affirmance, the Petition should be denied as to Johnson's sexual harassment claim.

B. The Tenth Circuit applied settled law in affirming summary judgment on Johnson's retaliation claim.

Summary judgment on Johnson's retaliation claim was affirmed because several months had passed between the alleged protected activity and the alleged retaliatory act, a reprimand in a meeting with E.A. Miller managers. The Tenth Circuit held both that the lengthy passage of time negated Johnson's attempt to show causation and that the reprimand did not constitute an adverse employment action.

The Petition does not directly address the Tenth Circuit's rationale. Instead, the Petition asserts that the retaliatory act was not a single reprimand, but rather the creation of an environment that was hostile toward Johnson. This argument, however, was not made to the Court of Appeals and is not supported by the record.

The Tenth Circuit correctly applied settled law in holding that a reprimand did not constitute an adverse employment action under Title VII. Pet. App. A at 4a-5a (*citing Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2268-69, 141 L. Ed. 2d 633, 652-53 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.")). At most, the Petition argues in effect that the Tenth Circuit misapplied a "properly stated rule of law." *See* Sup. Ct. R. 10. Accordingly, the Petition should also be denied as to Johnson's retaliation claim.

II.

THERE IS NO BASIS FOR A CLAIM BASED ON A "RACIALLY SEGREGATED WORKPLACE."

Although the Petition is unclear, it appears to urge review of Hispanic discrimination claims asserted by Rivera and Gorostieta on the basis of an alleged racially segregated workplace at E.A. Miller. Review should be denied. First, this Court has already declared that "a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance* in the work force." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657, 109 S. Ct. 2115, 2124-25, 104 L. Ed. 2d 733, 751 (1989) (emphasis in original). Because Rivera and Gorostieta have never demonstrated that a specific practice of E.A. Miller caused the alleged racial imbalance, there is no basis for a Title VII claim alleging a disparate impact.

Second, the Petition should be denied because Rivera and Gorostieta did not demonstrate that the environment was hostile to them. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295, 302 (1993) (plaintiff must subjectively perceive environment to be hostile). Neither Rivera nor Gorostieta claimed that any derogatory racial epithets were directed at him personally, and Rivera apparently claims he heard such language used only once. The name-calling described in the Petition is simply a collection of isolated racial or ethnic epithets that allegedly occurred over a number of years in a large industrial plant. There is no evidence of any

impact on Rivera or Gorostieta. Moreover, even if such epithets had been directed at Rivera and Gorostieta personally, isolated statements do not create a hostile work environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662, 676 (1998). Accordingly, the Petition should be denied as to claims of a racially segregated or racially hostile environment.

III.

THE DISABILITY DISCRIMINATION CLAIMS WERE PROPERLY DISMISSED.

A. Petitioner Gorostieta's claim was properly dismissed because an indefinite period of leave is not a reasonable accommodation.

The Tenth Circuit affirmed summary judgment on Gorostieta's claim because he never advised E.A. Miller how long he would be in rehabilitation. The Tenth Circuit therefore construed the requested accommodation as an indefinite period of leave, which is not a reasonable accommodation as a matter of law. Pet. App. A at 6a-7a (*citing Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996)). The Petition argues this rule impermissibly "places the burden of providing reasonable accommodations on the employee." The Petition does not identify any split in the circuits regarding the Tenth Circuit's rule regarding indefinite leave. Indeed, there is no conflict. *See Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998) (employer need not provide indefinite leave of absence as reasonable accommodation under the ADA); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997)

(same); *Watkiss v. J&S Oil Co., Inc.*, 164 F.3d 55 (1st Cir. 1998) (same); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995) (same); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996) (same). No courts have held to the contrary. Accordingly, review should be denied as to Gorostieta's disability discrimination claim.

B. Petitioner Rivera's claim was properly dismissed because he failed to present evidence of pretext.

The list of "Questions Presented" in the Petition does not address any issue raised by Rivera's disability claim. Accordingly, issues related to Rivera's disability claim should not be considered by the Court. Sup. Ct. R. 14.1(a).

Even if Rivera's claim had been properly preserved for review, no basis for review has been demonstrated. The Tenth Circuit ruled that this claim was properly dismissed because Rivera conceded that E.A. Miller honestly believed he had committed a serious safety violation. Furthermore, it is undisputed (i) that E.A. Miller rules stated serious safety violations would merit immediate dismissal; and (ii) that Rivera was immediately suspended and, after a short investigation, dismissed. There was no evidence that the stated reason for Rivera's termination, a serious safety violation, was a pretext.

Finally, the Petition does not even address the basis for the Tenth Circuit's decision. Accordingly, the Petition should be denied as to Rivera's disability discrimination claim.

CONCLUSION

The Petition does not present any question that merits review. The Tenth Circuit decision is both correct and unremarkable in its application of settled law. The Petition distorts the facts and the Tenth Circuit opinion and does not present a clear and understandable argument on any of the issues it purports to bring before the Court. For these reasons, the Petition should be denied.

DATED: October 15, 1999.

Respectfully submitted,

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